No. 251

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

SEAMPRUFE, INC. (HOLDENVILLE PLANT),
Respondent

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

Opinions Below

The opinion of the court below (R. 97-100) is reported at 222 F. 2d 858. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 10-25, 35-38) are reported at 109 NLRB 24.

Jurisdiction

The judgment of the court below was entered on May 4, 1955. (R. 101). The petition for a writ of certiorari was filed on July 21, 1955, and granted on October 10, 1955. (R. 101). The jurisdiction of this Court rests on 28 U.S.C. 1254, and Section 10 (e) of the National Labor Relations Act, as amended.

Questions Presented

1. Where respondent had neither a no-solicitation nor a no-distribution rule, where there is no evidence that respondent ever interfered or attempted to interfere with solicitation or distribution on its property by its employees, where respondent had a no-trespass rule in respect to which it was not improperly motivated and which was enforced on a non-discriminatory basis, where two-thirds of the approximately 200 employees at respondent's plant reside in a town of about 6,000 population on the outskirts of which the plant is located and the remaining one-third reside in communities within five to ten miles around that town with a few living as far as thirty miles from the plant, where there is no evidence that the charging union ever attempted in any way to communicate with respondent's employees anywhere off respondent's property, and where the charging union does not represent any of its employees for purposes of collective bargaining, did respondent violate Section 8 (a) (1) of the National Labor Relations Act by refusing to permit non-employee union representatives to enter upon and use its property particularly its parking lot and the area adjacent to and outside the doors to its building, for the purpose of soliciting union memberships and distributing union literature?

2. Whether the order of the Board is too broad, vague and indefinite?

Statute and Constitutional Provision Involved

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.)*, and the text of the Fifth Amendment to the Constitution of the United States are set forth in the Appendix, *infra*, pp. 46-49.

Statement

I.

The Facts

A. Respondent's plant and operations

Respondent operates a manufacturing plant located on the outskirts of Holdenville, Oklahoma, a town of approximately 6,000 residents. (R. 12, 93)

It employs approximately 200 persons on a one-shift basis. (R. 71) Two-thirds of the employees live in Holdenville, and the remaining one-third live in communities within five or ten miles of Holdenville with a few living as much as thirty miles from the plant. (R. 75)

The factory building is situated on a twenty-five acre tract of land. (R. 69) A map or plat of the property is in the record which shows the location of the building, parking lots, etc., as well as the public road ways abutting it. (R. 70, 93)

The parking lot used by employees is situated on respondent's property immediately behind the factory building and north of the Airport Road which adjoins the property on the south. There is a private road

running northward from the Airport Road and between the west (back) side of the factory building and the parking area. (R. 47-48) There is no fence between the building and the parking lot. (R. 51, 93) There is a sidewalk along the east side of the private road that connects with a sidewalk running in an easterly direction to the west doors of the factory building. (R. 13, 53)

The employees ride to and from work in privately owned automobiles. (R. 12, 42-43) They enter respondent's property from the Airport Road and drive northward along the private road. (R. 48)

Those who drive their cars park them on the parking lot immediately behind the factory building and then walk to the rear entrance of the building. (R. 47, 48)

On leaving the plant after work the cars proceed northwardly along the private road, then turn to the right and proceed easterly along the north side of the factory building to the public "Access Road" which adjoins respondent's property on the east. (R. 67) There are no stop signs at the points at which the private road joins the Airport Road or the Access Road. Traffic on these public roads is light. (R. 13)

There was testimony to the effect that at the close of work one day in January, 1954, as the employees' cars left respondent's property and entered the public road most of them were proceeding slowly "bumper to bumper", and that none of them stopped, (R. 13-14, 18, 42-43, 50, 64-66) The record does not show that on that occasion any attempt was made to invite or

request the drivers of any of the cars to stop to talk or to receive literature or for any other purpose or that there was any reason or occasions for the cars to be stopped.

There is no evidence that the charging union represented any of the employees at the Holdenville plant for purposes of collective bargaining. (R. 11)

B. Respondent does not have a no-distribution or no-solicitation rule in respect to its employees.

There is no evidence that respondent had a no-solicitation or a no-distribution rule. Likewise there is no evidence that respondent ever prohibited or attempted to prohibit its employees, or any of them, from distributing union literature or from soliciting union memberships or from engaging in any other activities on its property in behalf of the union or in respect to self-organization.

C. Respondent's no-trespassing rule, the enforcement of which gave rise to the case at bar, was neither improperly motivated nor discriminatorily applied.

In connection with the policing of its property, respondent adopted and enforced a no-trespassing rule. (R. 83-84) Signs to that effect were placed on its property. (R. 62-64, 71-72) The rule was enforced on a non-discriminatory basis, and no contrary contention or finding was made. Respondent's motivation in adopting and enforcing the rule was not questioned.

In the non-discriminatory enforcement of its no-trespassing rule respondent did not permit strangers to come upon its property without its permission. It withheld such permission from various persons embarked on various missions including non-employee union organizers employed by the charging union who sought to station themselves on respondent's property between the parking area and the factory doors for the purpose, on some occasions, of distributing union literature and, on other occasions, of simply saying "Good morning" to the employees. (R. 83)

It is undisputed that the persons in respect to whom the no-trespassing rule was enforced were not employees of respondent. (R. 11, 40, 46, 60, 68)

D. No attempt was ever made by the charging union or its representatives, so far as the record shows, to solicit union memberships from or to distribute literature to or otherwise to communicate with respondent's employees at the entrances or exits to respondent's property or elsewhere or otherwise off respondent's property, and they were not prevented from so doing.

The record is barren of anything to show that the charging union or its representatives ever attempted to distribute literature to or to solicit union memberships from or to communicate otherwise with respondent's employees anywhere off respondent's property or that any circumstances of employee inaccessability were present.

E. The only alleged unfair labor practice involved is the respondent's maintenance and enforcement, in the foregoing circumstances, of its no-trespassing rule in respect to non-employee union organizers.

The record contains nothing in respect to any alleged unfair labor practices on the part of respondent other than the maintenance and enforcement of its no-trespassing rule in respect to non-employee union organizers.

II.

The Board's Conclusions and Order

The findings and conclusions of the Trial Examiner were adopted by the Board. (R. 35)

Thus the Board concluded (R. 35, 20-21) that the rights of non-employee union representatives and the rights of respondent's employees are the same in respect to the use of respondent's property, particularly the parking lot and the area between that lot and the back doors to the factory building, for the purpose of soliciting union memberships and distributing union literature.

The Board found (R. 35, n. 2) that the distinction between respondent's no-trespassing rule and a no-solicitation rule "is one without a difference", and concluded (R. 35, 20) that "Normally, an employer cannot forbid union solicitation on company property during nonworking time even where there is no showing that solicitation away from the plant would be ineffective."

The Board further concluded (R. 35, 18, 19-20) that in order for respondent to sustain its rule which prevented non-employee union representatives from using its property for purposes of solicitation and distribution the burden was on respondent (a) to show that such rule was necessary in order to maintain production or preserve discipline in the plant or (b) to show the existence of "unusual circumstances" which would "override the Union's right to distribute its literature on Company property", neither of which respondent did.

Because of the "special circumstances" evidenced by the fact that normally employees do not stop their cars in driving to and from respondent's property, the Board concluded (R. 35, 14, 18, 36, n. 2) that "***the difficulty of reaching prospective union members and distributing union literature off of respondent's property is virtually impossible***", notwithstanding there is no evidence that the union ever attempted to communicate with employees off of respondent's property.

The Board concluded (R. 35, 21), therefore, that the maintenance and enforcement by respondent of its no-trespassing rule constitutes an unreasonable impediment to freedom of communication essential to the exercise of its employees' right of self-organization and as such violated Section 8 (a) (1) of the Act.

Accordingly, the Board ordered (R. 36-38) respondent (1) to cease and desist from (a) "Enforcing its rule prohibiting the distribution of union lit-

erature and solicitation of union membership on and adjacent to its parking lot during the employees' nonworking time ***" and (b) "Engaging in any like or related acts or conduct ***", and (2) to (a) rescind said rule and (b) post notices which pointed out that while respondent may establish "reasonable controls", "full access" shall not be denied to union representatives for the purpose of distribution.

III.

The Decision of the Court Below

The court below (R. 97-100) denied enforcement of the Board's order.

The court pointed out (R. 100) that when conducted by employees the solicitation of union membership on company property amounts to the exercise of a right subject only to the correlative right of the employer to maintain plant production and discipline and that an employee on company property exercising the right of self-organization does not violate a company no-trespass rule. But, it concluded, a non-employee labor organizer who comes upon company property in violation of a non-discriminatory no-trespass rule can justify his presence there only insofar as it bears a cogent relationship to the exercise of the employees' guaranteed right of self-organization.

Noting that the union which the non-employee solicitors represented was not the bargaining agent for the employees the court concluded (R. 100) that they were strangers to the right of self-organization,

absent a showing of non-accessibility amounting to a handicap to self-organization.

The court further held (R. 100) that the special circumstances of inaccessibility found by the Board were not legally justified by the facts, that these circumstances did not insulate the employees from the union organizers, that the employees lived in or near a small city and were easily accessible to union solicitors, that the no-trespass rule was non-discriminatory, that there was no showing of anti-union discrimination, and that there was no impediment to union solicitation off company property amounting to a deprivation of the right of self-organization.

The court concluded (R. 100) that respondent's enforcement of its no-trespass rule did not constitute an unfair labor practice and therefore denied enforcement of the Board's order.

The court did not pass on the constitional question posed in respect to the invasion and taking of respondent's property that would result from the enforcement of the Board's order. (R. 30-31) Neither did it pass on the question raised in respect to the broad reach of the order.

Summary of Argument

(1) The Board's order is not supported by and is contrary to the record considered as a whole and the court below properly denied enforcement.

(2) This court's decision in *National Labor Relations Board v. Le Tourneau Company of Georgia*, 324 U. S. 793, does not pass on the issues here presented

and the principles therein enunciated cannot be extended logically or properly to support the right of non-employees to use respondent's property under the facts of this case.

Absent a showing, as in this case, of discrimination against union organizers in respect to the use of its property (as in the *Stowe*[1] or *Marshall Field*[2] cases) or that the union whose representatives sought access to its property was the bargaining agent of the employees (as in the *Cities Service*[3] or *Richfield*[4] cases) or that the employees were laboring under a "unique handicap" or unreasonable difficulty in respect to accessibility to union organizers (as in the *Lake Superior Lumber*[5] case), no court has held that non-employee union organizers have the right to enter upon and use an employer's private property for organizational purposes contrary to his wishes. Any such holding would be violative of the employer's property rights under the Constitution.

(3) The Board erred fundamentally when it attempted to equate the rights of employees who were on respondent's property in consequence of their employment there and of non-employees to use such property for organizational purposes. The right to self-organization is vested in the employees and not in non-employees who want to solicit the employees for membership in a union.

[1] *National Labor Relations Board v. Stowe Spinning Co.*, 336 U. S. 226
[2] *Marshall Field and Company v. National Labor Relations Board*, 200 F. 2d 375
[3] *National Labor Relations Board v. Cities Service Oil Co.*, 122 F. 2d 149
[4] *Richfield Oil Corp. v. National Labor Relations Board*, 143 F. 2d 860
[5] *National Labor Relations Board v. Lake Superior Lumber Co.*, 167 F. 2d 147

(4) Respondent never prevented or attempted to prevent its employees from soliciting union memberships or distributing union literature on its property. Likewise neither the charging union nor any of its representatives ever attempted to solicit union memberships, to distribute union literature, or to communicate with the employees anywhere off of respondent's property.

No "unique handicap" or unreasonable difficulty in communicating with respondent's employees was shown to exist which might, "on balance", and aside from the constitutional questions involved, justify the requirement that respondent yield up to non-employee union organizers the use of its property for organizational purposes.

The argument of the Board based on the alleged apathy and ignorance of the employees in respect to the exercise of their rights under the Act and the "convenience" and "effectiveness" that would stem from use of the respondent's property by non-employee organizers as compared with their communicating with employees off of such property in union meetings, in the employees' homes, and elsewhere, and by mail, telephone and otherwise is completely outside the record, furnishes no support for the Board's order, and is patently wide of the mark. It completely overlooks, among other things, the right of employees to refrain from self-organization and other concerted activity.

(5) The court below was correct in deciding in this case that, absent a showing of non-accessibility amounting to a handicap to self-organization, there

was no impediment to union solicitation off respondent's property and that the non-discriminatory enforcement by respondent of its no-trespass rule did not constitute an unfair labor practice.

(6) Reversal by this court of the decision of the Court of Appeals for the Fifth Circuit in the case of *National Labor Relations Board v. Babcock and Wilcox Company*, 222 F. 2d 316, certiorari granted October 10, 1955, No. 250, this Term would not require or support reversal of the decision of the Court of Appeals for the Tenth Circuit in this case.

Argument

I.

The Findings and Order of the Board Are Not Supported by the Record.

A. The facts here are substantially different from those in *Babcock and Wilcox*.

The Board in its brief in this case has adopted the argument made in its brief in *National Labor Relations Board v. The Babcock and Wilcox Company*, No. 250, this Term, on the premise that the questions there and here presented are the same. (Board's brief, p. 6)

While respondent is of the opinion that the *Babcock and Wilcox* case was correctly decided by the Court of Appeals for the Fifth Circuit, it does not agree that the questions there presented and here involved are the same so that the decision of this Court in that case will or should rule this case.

There are substantial and material differences in

e facts, in the Board's decisions and orders, and in e opinions of the courts below as an examination of e records in the two cases will disclose.

In the *Babcock* case:

(1) The Board contends that the respondent there had promulgated a "blanket" rule prohibiting distribution of literature on its parking lot either by employees or by any outsiders. (Board's brief, p. 5)

(2) It appears that the union there made some attempt to communicate with employees off of the company's property. (Board's brief, pp. 4-5, 41)

(3) The parking lot was outside the fence enclosing the plant and the employees had to pass through guarded gate houses in entering the plant. (Board's brief, pp. 3, 24-25)

(4) The Board asserts that 60 per cent of the employees live "in widely scattered" small communities or in the countryside within a radius of 30 miles of the plant and that posted along the highway as it passes the company's premises are state highway signs reading "No parking" and "Speed limit 60 miles per hour". (Board's brief, pp. 3-4, 41)

In the case at bar:

(1) No "blanket" rule is involved.

(2) No attempt was made by the union to communicate with employees off company property and they were not prevented from so doing.

(3) The parking lot is enclosed within the plant fences, and there are no guards or gate houses.

(4) The respondent's employees basically are concentrated in the Holdenville area and the roads to and around the plant property are local in nature with no prohibition of parking.

The Board's order in this case would require respondent to permit its property to be used by non-employees for purposes of solicitation as well as distribution whereas only distribution is involved in the *Babcock* case. (Board's brief, p. 7)

The notice which the Board's order in this case would require to be posted provides for "full" access to be accorded non-employee union representatives whereas only access is required in the *Babcock* case.

The opinion of the court below in this case is not subject to the criticism which the Board undertakes to make in respect to the court's opinion in the *Babcock* case.

Respondent therefore respectfully submits that reversal of the *Babcock* case would not require or support a reversal of the decision of the court below in this case.

. The employees here were not inaccessible to non-employee union organizers off respondent's property.

Here no special circumstances of inaccessibility of mployees to union organizers existed. The court be-ow correctly held (R. 100) that the Board's conclu-ion that such circumstances existed is not "legally ustified by the facts". The court pointed out that the employees here lived in or near a small city and ere easily accessible to union solicitors" and that here was no impediment to union solicitation off ompany property. (R. 100)

The effect of the absence of inaccessibility in respect o the right of non-employee organizers to use an em-loyer's property for organizational purposes was learly recognized and stated in the concurring opinion f Board Chairman Farmer and Member Peterson in *Tanco, Inc.*, 109 NLRB 998 at 1000, 1001, wherein hey said;

> "The single issue in this case is strictly limited to the extent of an employer's right to deny to non-employee union representatives the privilege of distributing union campaign literature on the company's parking lot. As we view it, the rule in such situations is that an employer may not enforce *such a rule if in fact it is impossible or unreasonably difficult for the union to distribute organizational literature to the employees entirely off the employer's premises.*
>
> We agree with the majority on the record before us that the General Counsel has, by affirmative evidence, proved such inaccessibility at this plant.

We do not, however, adopt the breadth of the rationale set out by the Trial Examiner in his Intermediate Report, wherein he apparently confuses the question of an employer's right to exclude nonemployees from the parking lot and the employer's right to prohibit union solicitation and activity by its employees on company property during nonworking hours. There is an implication in the Intermediate Report that, whenever an employer would exclude nonemployees from the parking lot, 'the burden is upon the employer to show the existence of circumstances warranting the prohibition'. That is not the law as we understand it. An employer must justify, by carrying an affirmative burden resting upon him, a blanket prohibition against union activities or solicitation by his employees on company property. *However, when it comes to the exclusion of strangers from the plant premises, the exercise of such privilege does not depend upon an employer being able to affirmatively prove that the rule is justified. Rather, as stated above, the affirmative burden rests upon the General Counsel to prove inaccessibility off the premises, and failing this the outside organizers have no right, enforceable by this Board, to come on the employer's premises for organizing purposes.* We concur in the majority decision because we are satisfied that the General Counsel has sustained his Burden of Proof." (Emphasis added.)

C. The cases in which the innaccessibility of employees posed a serious or unique handicap or unreasonable difficulty in respect to self-organization have no application.

The fact situation presented in the case of *N.L.R.B. v. Lake Superior Lumber Corp.*, 167 F. 2d 147 (C.A. 6) was entirely different from that presented here. There, as the court pointed out, the employer's camps situated on land controlled by it were located 17 or 18 miles from the nearest city, the woodsmen worked from 7:00 a.m. to 4:00 p.m. six days a week, "and usually spent all their time, including Sundays, in the camps". The employees were charged for their lodging. 167 F. 2d 147 at 148. The issue was whether or not in those circumstances the employer was entitled to prevent union organizers from coming into the camps for the purpose of communicating with the employees in the bunkhouses and recreation hall during their free time. The court concluded in favor of the right of union organizers to visit employees on the property of the employer under reasonable regulations, ". . . where the circumstances are such 'that union organization must proceed upon the employer's premises or be seriously handicapped' ". 167 F. 2d 147 at 151. In so holding it appears that the court attached significance to the fact that the employees there spent their free time on the employer's property "as a matter of right". 167 F. 2d 147 at 152.

In the instant case the Board's conclusion that it was "virtually impossible to distribute union literature to employees or to solicit union memberships off re-

spondent's property" was based solely on the fact that on one occasion the employees when leaving work did not stop their cars upon reaching the public road abutting the plant property. No attempt was made to invite them to stop, and there was no occasion or reason for them to do so. The Board inferred that the employees employed this same "non-stop" driving in arriving at the plant.

The record is barren of anything to show that the union ever attempted to distribute literature to employees at the entrances or exits to respondent's property off of said property. The Board expressed the belief, however, that it was not necessary that such attempts be made as it was "apparent that the nonstop method of driving by the employees would have rendered the effort futile and abortive". (R. 36)

The court below, noting that the Board found special circumstances of inaccessibility, said:

> "But we do not think that conclusion is legally justified by the facts." (R. 100)

Continuing, the court said:

> "Unlike the employees of a lumber or mining camp who live and work on company property isolated from outside contacts, as in *N.L.R.B. v. Lake Superior Lumber Corp.*, supra, the employees here lived in or near a small city and were easily accessible to union solicitors. There was no impediment to union solicitation off company property amounting to a deprivation of the right of self-organization." (R. 100)

This statement was quoted with approval by the

court in *N.L.R.B. v. Monsanto Chemical Co.*, 225 F. 2d 16, 21.

In the *Ranco* case, 109 NLRB 998, the Board found in effect that under the facts there involved the employees were under such a serious handicap in respect to self-organization off company property that it was appropriate to require the company to permit distribution of union literature by non-employee organizers on company parking lots. The Court of Appeals for the Sixth Circuit granted enforcement of the Board's order by per curiam opinion in which it stated that there was substantial evidence to support the Board's findings of fact and that the Board properly applied the principles of decisions in the *Lake Superior Lumber* case and others. *N.L.R.B. v. Ranco, Inc.* 222 F. 2d 543. It appears, therefore, that the court was of the opinion that a serious handicap there existed as in the *Lake Superior Lumber* case. Certiorari was granted by this Court in *Ranco, Inc. v. N.L.R.B. No. 422, on* November 14, 1955.

The Court of Appeals for the Seventh Circuit made the following pertinent summary statement in *Marshall Field and Co. v. N.L.R.B.*, 200 F. 2d 375 at 379:

> "The courts have held that Sec. 7 of the Act gives a right to a non-employee to enter and solicit union membership on an employer's premises under two general situations, the first of which is where there has been discrimination. *N.L.R.B. v. Stowe Spinning Co.*, 336 U. S. 226, 69 S. Ct. 541, 93 L.Ed. 638; *Bonwit Teller, Inc. v. N.L.R.B.* 2 Cir., 197 F. 2d 640. However, the Board found that discrimination did not exist in the instant case. The second situation is where union organi-

> zation must proceed upon the employer's premises or be 'seriously handicapped.' An illustration is where a lumber camp was isolated and its very location prevented employees from gaining access to outside contacts. *N.L.R.B. v. Lake Superior Lumber Corp.*, 6 Cir., 167 F. 2d 147."

None of those situations is here presented.

D. Enforcement of the Board's order would result in a taking of respondent's property in violation of the Fifth Amendment.

The respondent contends that the decision of the court below should be affirmed on the basis of the decisional principles therein applied and hereinabove discussed without the necessity of reaching the constitutional questions raised by the Board's order. Respondent further contends that the enforcement of the Board's order would result in the taking of its property in violation of the Fifth Amendment.

The enforcement of the Board's order would create a servitude on respondent's property in favor of nonemployee union organizers under and by virtue of which they would have the right to enter upon and to use such property for organizational purposes over respondent's objection and contrary to its wishes.

Respondent recognizes, of course, that its rights in its property are not absolute. Its use of that property is circumscribed by applicable governmental regulations made within permissible constitutional limits.

Assuming, without admitting, that Congress has the power to authorize the imposition of the conditions and

limitations prescribed by the Board's order the fact remains that the Act contains no such provision and neither the Act nor its legislative history evidence any congressional intent or purpose to authorize any such action or result.

The courts, in construing the Act, have not held that the Board is authorized or empowered to make an order such as is here involved in the circumstances here presented.

In the *Cities Service* case the Court of Appeals observed that

> "It is not every interference with property rights that is within the Fifth Amendment and we see no basis for invoking the Constitution in the present situation. . . . Inconvenience, or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining." 122 F. 2d 149 at 152.

In the *Cities Service, Richfield, Lake Superior Lumber* and similar cases the employees *lived* as well as worked on the property to which the non-employee organizers sought access.

In the *Cities Service* and *Richfield* cases the unions involved had status under the law as bargaining agent for the employees who worked and lived on the tankers and who, in consequence, were denied access to their bargaining agent absent the right to communicate with the representatives of that agent on board the vessels.

The Courts of Appeals enforced the Board's orders only in respect to access for the purpose of discharging

statutory duties as the bargaining agent and not for purposes of solicitation. Such cases included carrying on business with the employer's representatives.

In the case of *Lake Superior Lumber* the employees lived on company property and paid for their lodging. The Trial Examiner, with Board approval, found that the employees were tenants in the employer's camps and as tenants had the right to receive any person in their home with whom they had legitimate business. 70 NLRB 178 at 196. No such tenancy is here involved. Moreover the factor of inaccessibility there involved is not here present. The nature and extent of the dislocation of property rights in the circumstances of such tenancy and inaccessibility in that case is entirely different from that which the Board's order here requires. Further the justification for such dislocation in that case does not lie under the facts of this case.

In the *Stowe* case the employer had surrendered possession and control of its property in question to a fraternal organization. This Court was very careful to point out that ". . . the very denial of the hall" was not found to be an unfair labor practice and that only discrimination was involved. 336 U.S. 226 at 233. The Board's order was modified so as to provide only against discrimination by the employer. No taking of the employer's property there resulted such as would result should the Board's order here be enforced. Mr. Justice Jackson there stated

> "If the employer's were controlling the hall directly, I would have serious doubts whether denial of union use of the hall could be an unfair labor practice . . .". 336 U.S. 225 at 235.

In the *Marsh* case the property involved had been opened by the owner to use by the public. That was also true of Holden Court in the *Marshall Field* case. In this case respondent's property is not open to the public.

The Board's order would force respondent to open its property to use by anyone representing a union. This, respondent submits, necessarily involves a taking of its property without warrant in law or fact and in contravention of its rights under the Constitution. This vice in the Board's order is not met or cured by the "on-balance" or "convenience" arguments that the Board makes when it says, in effect, that the injury suffered by respondent in consequence of the taking of its property that the order would entail is less than that which unions and their organizers would suffer if respondent's property were not turned over to them, particularly where, as here, there is no showing that union organizers could not conveniently pursue their activities off respondent's property.

II.

Neither *Le Tourneau* Nor Any Reasonable Extension of It Afford a Basis in Law for the Board's Order According Non-Employee Union Organizers the Right to Enter Upon and Use Respondent's Property.

This Court has never decided the question here presented.

A. The issue involved in this case was not decided by this Court in the *Le Tourneau* case.

In *Le Tourneau* the pertinent issue involved the application of a no-distribution rule to **employees** who were then on the company's property in consequence of their employment and not to union organizers who were strangers.

There the issue was stated by the Board as follows:

> "**** the *sole question* confronting us is whether, under the circumstances of the instant case, to the extent that the rule prohibits *distribution of union literature by employees* on the parking lots, it constitutes such a serious impediment to the freedom of communication *** that the right to self-organization must be held paramount, and the rule give way." 54 NLRB 1253, 1260 (Emphasis added)

The order of the Board therein provided that the company shall "Rescind immediately the rule against distribution of literature *insofar as it prohibits distribution of union literature by employees* outside the gates of the plant and in the parking lots." 54 NLRB 1253, 1264 (Emphasis added)

In its brief to this Court in that case the Board said,

> "The facts in the instant case do not present and the Board did not consider the question which would arise if union representatives who were not employed at the plant sought to distribute literature on the parking lots ***." Board Brief in No. 452, October Term, 1944, page 29, footnote 17.

Thus it is clear that the decision in *Le Tourneau* concerned only the application of a no-distribution rule to employees and not to non-employees.

B. The principles recognized and enunciated in *Le Tourneau* do not support or constitute authority for the Board's decision and order herein.

The Board's reliance upon and attempted extension of the *Le Tourneau* decision to support its decision and order herein is made clear in the following conclusion of the Trial Examiner (R. 20-21) which was adopted by the Board (R. 35):

> "To differentiate between employees soliciting on behalf of the Union and nonemployee union solicitors would be a differentiation not only without substance but in clear defiance of the rationale given by the Board and the Courts for permitting solicitation. This conclusion is based on the belief that the rationale enunciated by the Supreme Court in the Le Tourneau case, supra, is equally applicable in the case of solicitation by union representatives as well as where the solicitation is done by employees."

This attempt to equate the rights of employees and

of non-employees to use the respondent's property for the solicitation of union memberships and the distribution of union literature is the foundation upon which the Board's decision and order herein primarily are rested. Respondent submits that it is completely unwarranted by *Le Tourneau* or any other decision of this Court and that it constitutes a fundamental error in the Board's decision which will not permit its order to stand.

Based upon the erroneous premise that the rights of non-employees are the same as those of employees to use the respondent's property here involved for organizational purposes, the Board undertook to invoke and apply principles enunciated or recognized in *Le Tourneau*.

Thus it held that the burden was on respondent to sustain its no-trespassing rule by showing (a) that it was "necessary to maintain production or preserve discipline in the plant" (R. 18) or (b) that "special circumstances" pertaining to the operation of its particular plant "*** override the union's right to distribute its literature on company property ***". (R. 19-20)

This rule, applied by the Board in *Le Tourneau*, was drawn from its decision in *Peyton Packing Company*, 49 NLRB 828, at 843, 844, to which this Court made reference in its *Le Tourneau* decision (324 U.S. at 803, 804). In the *Peyton* case the Board said:

> "*** time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes

without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation *by an employee* outside of working hours, although on Company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline." (Emphasis added)

The last sentence of this quotation defines the area of adjustment "on balance" between the rights of employees to self-organization and the property rights of the employer to which this Court referred in *Le Tourneau*. Patently it furnishes no authority for the argument of the Board that the determination of whether respondent is legally entitled to keep **non-employees** off of its property turns "on balance" as between the injury that respondent would sustain if its property rights were violated and the injury the union, and presumably the employees, would suffer in time, expense and inconvenience in organizing if respondent's property rights were respected.

Further the Board drew from its *Le Tourneau* decision and here undertook to apply the holding that "It is no answer to suggest that other means of disseminating union literature are not foreclosed" in rejecting the contention that because the union had adequate means of communication with the employees outside of company property the enforcement of a rule which prohibited solicitation by non-employees

on company property did not improperly restrict the employees' rights under Section 7 of the Act. (R. 20)

Clearly the foregoing principles of *Le Tourneau* which the Board has sought to apply here relate peculiarly and only to employees who are on their employer's property in consequence and in pursuance of their employment. One of the two employees involved in *Le Tourneau* was on his lunch hour and the other one was on a bus on company property preparing to leave after completing a day's work when the violations of the no-distribution rule occurred. Their physical presence on the property was neither contrary to their employer's wishes nor violative of his property rights.

The rule there impinged on the activities of employees — the very persons in whom the rights enumerated in Section 7 of the Act are vested—not on outside organizers who desired to solicit on behalf of a union or otherwise participate with the employees in the exercise of those rights.

Even as to employees the *Le Tourneau* decision is not authority for the proposition that those who are not on their employer's property in connection with and as a part of their employment may enter upon and use such property for organizational purposes at their will and pleasure subject only to reasonable rules and regulations necessary for the maintenance of production and discipline. Any such holding would raise serious constitutional questions.

Rules and regulations necessary for the maintenance of production and discipline are peculiarly ap-

plicable to employees. The principle involved which was spelled out in the *Peyton* case and applied in *Le Tourneau* must be viewed and applied in the situation in which it was evolved—in the employer-employee relationship, and not in the relationship of the employer to non-employees. In this connection Mr. Justice Reed pointed out that in the *Le Tourneau* and *Republic* cases "*** the problem concerned the right of an employer to maintain discipline by forbidding employees to foster by personal solicitation union organization on the grounds or in the plant of the Company during the employees' non-working time". Continuing he said, "We held that, unless there were particular circumstances that justified such a regulation to secure discipline and production, the employer must allow such discussion." 336 U.S. 226, at 243-244.

By its order in this case (R. 36, 37) the Board would accord respondent the right to impose reasonable and non-discriminatory regulations "in the interest of plant efficiency and discipline" in respect to the use of its property for organizational purposes but not so as to deny "full access" to non-employee union organizers for the purposes of soliciting union memberships and distributing union literature. Plant efficiency and discipline make sense when related to employees but they become sheer nonsense when they are related to non-employees. How can an employer provide for the discipline of non-employees who are trespassers as to him and over whom he can exercise neither sanction nor control?

Thus it is seen from the context in which the princi-

ples of *Le Tourneau* were evolved that when applied to employees in the circumstances of that case they appear reasonable but that they do not cover and cannot logically or reasonably be made to apply to non-employees in the circumstances of this case.

This was recognized in the concurring opinion of Chairman Farmer and Member Peterson in *Ranco, Inc.*, 109 NLRB 998 at 1000, 1001 as has been pointed out above. It was there stated that:

> "*** when it comes to the exclusion of strangers from the plant premises, the exercise of such privilege does not depend upon an employer being able to affirmatively prove that the rule is justified. Rather, ***, the affirmative burden rests upon the General Counsel to prove inaccessability off the premises, and failing this the outside organizers have no right, enforceable by this Board, to come on the employer's premises for organizing purposes."

It will be observed that neither in the *Ranco* case nor in this case was any mention made of accessibility off of the employer's property having to be in the "immediate vicinity" of or "immediately adjacent" to such property in order to avoid subjecting such property to use by non-employee organizers. This condition was engrafted on the statement of the "Questions Presented" in the Board's petition and brief to this Court. It had not theretofore appeared in the litigation, and it does not appear in any case on which the Board relies for the support of its order.

Under the Act the right to organize and to engage in concerted activity or to refrain therefrom is vested

solely in the employees. As the Court of Appeals for the Ninth Circuit said in *N.L.R.B. v. Monsanto Chemical Company*, 225 F. 2d 16, "It is to the employees that rights are granted by § 7". The exercise of their rights is for the employees alone and not for outside organizers who have no right to exercise the employees' rights in whole or in part. The principle is well established that one can assert only one's own rights and not the rights of others. *Jeffrey Mfg. Co. v. Blagg*, 235 U.S. 571, 576, *Virginia Railway v. Federation*, 300 U.S. 515, 558, *Bourjois, Inc. v. Chapman*, 301 U.S. 183, 190.

The extent to which the factor of non-accessibility of the employees off of the company's property under the facts there present figured in the *Le Tourneau* decision is not apparent. While the Board asserted that it was no answer to its criticism of the no-distribution rule that other means of communication off of the company's property were not "foreclosed", it is apparent that the Board attached great significance to the factor of non-accessibility both in its decision and before this Court. Otherwise it would not have labored as it did the facts in that connection which patently are substantially different from those in this case. In addition it appears that the Board there undertook to supplement the facts of record with its so-called expert knowledge in the field of labor relations as it has undertaken to do in its brief in this case.

In the latter connection it must be recognized that significant changes in the law have occurred since this Court's decision in *Le Tourneau*. The legislative history of the Taft-Hartley Act clearly reflects congres-

sional dissatisfaction with Board decisions that were rested on inferences drawn from "* * * specialized knowledge that is supposed to inhere in administrative agencies* * *" but "* * * that were not, in turn, **supported by facts in the record.** *(Republic Aviation v. N.L.R.B.,* 324 U.S. 793; *Le Tourneau Company v. N.L.R.B.*, 324 U.S. 793)." H. R. Rep. No. 510 80th Cong. 1st Sess. 55, 56, 1 Legislative History 559-560 (Emphasis added).

While this Court pointed out in *Universal Camera Corporation v. N.L.R.B.*, 340 U.S. 474, 485, 486 that the sufficiency of evidence to support findings of fact was not involved in *Republic* and *Le Tourneau*, the criticism of those decisions by the House conferees and the intent to preclude such decisions is nonetheless valid or clear. Adherence to the principles set forth by this Court in the *Universal Camera* case requires that the order in the case at bar be denied enforcement.

Whatever may be said of non-accessibility as a decisional factor in *Le Tourneau* the fact remains that in the case at bar **non-accessibility of respondent's employees to union organizers off of respondent's property was not proved and the court below was correct in so holding.** (R. 100)

Thus the Board's position is reduced to the bald and patently unsound proposition that the charging union and any other labor organization and their representatives have an enforceable right at the hands of the Board to use respondent's private property for organizational purposes among respondent's employees without regard for the factor of accessibility

and notwithstanding the existence of a non-discriminatory, no-trespassing rule, and the absence of unfair labor practices, and lack of union status as bargaining agent.

In *Le Tourneau* only a no-distribution rule was involved. In this case the Board's order would subject respondent's plant property to use by non-employee organizers for purposes of solicitation as well as distribution. This fact poses additional questions, the answers to which cannot be found in *Le Tourneau* or in any reasonable or constitutional extension of it.

Under the Board's order here the practical query naturally arises as to whether the non-employee organizers may solicit more than one employee at a time. If so, then obviously they may talk to and solicit groups of employees. The maximum permissible number in the group, the time such meetings may be convened, the length of time they may continue, and the means or methods of propagandizing and solicitation that may be employed properly are questions that are raised by the Board's order. Indeed they arise the very moment the respondent is forced to surrender the use of its property to non-employees as the Board's order would require.

The Board itself has recognized the impropriety if not the illegality of requiring an employer to open up his property to unions for group meetings when it said,

> "We do not believe that unions will be unduly hindered in their rights to carry on organizational activities by our refusal to open up to

them the employer's premises for group meetings, particularly since this is an area from which they traditionally have been excluded, and there remains open to them all the customary means for communicating with employees."

Livingston Shirt Corporation, 107 NLRB 400 at 401.

That the *Le Tourneau* decision cannot be extended properly under the facts of this case to support the right of non-employees to use respondent's property or the right of respondent's employees to have non-employees use that property as required by the Board's order is further elucidated in other decisions in respect to the use of employer's property that are discussed below.

C. The "blanket rule" rule cases in which employees as well as non-employees were prohibited from distributing literature on the employer's property furnish no support for the Board's order.

In support of its position the Board cites *N.L.R.B. v. Carolina Mills*, 190 F. 2d 675 (C. A. 4), *N.L.R.B. v. Caldwell Furniture Co.*, 199 F. 2d 267 (C. A. 4), and *N.L.R.B. v. Monarch Tool Co.*, 210 F. 2d 183 (C. A. 6).

The Board's decisions clearly show that each of these cases involved a broad rule which applied to employees. *Carolina Mills*, 92 NLRB 1141, *Caldwell Furniture Co.*, 97 NLRB 1501, *Monarch Tool Co.*, 102 NLRB 1242. The Court's opinion in the *Monarch* case makes clear the fact that the Board's order there was enforced on the authority of *Le Tourneau* because

of the applicability of the rule to employees. The per curiam opinions in the *Carolina* and *Caldwell* cases indicate that the same was true of those cases.

In this case the rule which is the subject of the Board's order had no application to employees. As the court below observed (R. 100) "An employee on company property exercising the right of self-organization does not violate a company no-trespass rule."

Thus the decisions involving "blanket" rules have no application to this case.

D. The cases dealing with discrimination in respect to the use of the employer's property and the use of privately owned property which is open to the general public are clearly inapposite.

1. The Stowe Spinning case

In the case of *N.L.R.B. v. Stowe Spinning Co.*, 336 U.S. 226, 233 (1949) the decision of this Court turned and was based on discrimination, as the following statement from the majority opinion clearly establishes,

> "In this case *** the Board did not find that the very denial of the hall was an unfair labor practice. *** What the Board found, and all we are considering here, is discrimination."

As was there pointed out the employer had turned over the possession and control of the company-owned meeting hall in the company town involved to a fraternal organization comprised in part of employees. This organization had permitted the hall to be used

for various meetings. It had agreed to let it be used for a union meeting when the employer intervened and caused that use to be denied. The employer did not contest the Board's finding that antiunion bias was the cause for its action.

This Court modified the Board's order so as to "order respondents to refrain from any activity which would cause a union's application to be treated on a different basis than those of others similarly situated." 336 U.S. 226 at 233.

Manifestly the facts in the *Stowe* case are substantially different from those here involved. In this case it is neither contended nor shown that respondent was improperly motivated in the promulgation or enforcement of its no-trespassing rule or that the rule was discriminatorily enforced.

While Mr. Justice Jackson agreed with the court that the Board was justified in finding that the employer's action in the *Stowe* case constituted an unfair labor practice, he did not think that this finding "is or can be based on discrimination". (336 U.S. 226 at 234) He went on the say in his opinion (336 U.S. 226, at 234-235)

> "The employers, having permitted the Patriotice Sons to control use of the hall, could not properly interfere and command reversal of the Sons' approval of the Union's application.
>
> *** The interference to oust the Union was enough without a discrimination, *** I think the Board could require the employer to notify the Patriotic Sons that it has been unfair in the objections heretofore made and that it will make

no objections in the future, and that the Patriotic Sons are free to allow such temporary use if they see fit.

But the Board's order goes beyond this. It has ordered that the employers take affirmative action to place the hall of the Patriotic Sons at the disposal of the Union. *** If the employer's were controlling the hall directly, I would have serious doubts whether denial of union use of the hall could be an unfair labor practice ***".

In his dissenting opinion in the *Stowe* case Mr. Justice Reed distinguished the situation there presented from that presented in *Le Tourneau* which involved the activities of employees and stated that:

> "It is only when there is a violation through an interference with or a restraining or coercion of employees' rights under Section 7 that an unfair labor practice may be predicated upon the employer's acts. The employer is not required to aid employees to organize. The law forbids only interference." 336 U.S. 226, 240, 241.

In respect to an employer's property rights and the rights of employees and unions he said,

> "There is nothing in this record that indicates a situation such as exists in employer owned lumber camps or mining properties. Where an employer maintains living, recreation and work places on such business premises open to employees by virtue of their employment, it has been held that exclusion of union organizers from contact with the employees is an unfair labor practice and that the Board's ordering the employer to grant union representatives access in

non-working hours to the employees under reasonable regulations is a proper means to effectuate the purpose of the Act. *Labor Board v. Lake Superior Lumber Corp.*, 167 F. 2d 147. *It has never been held that where the employees do not live on the premises of their employer a union organizer has to be admitted to those premises.*" 336 U.S. 226, 243 (Emphasis supplied)

"After an organizer has convinced an employee of the value of union organizations, that employee can discuss union relations with his fellow employees during non-working hours in the mill. This gives opportunity for union membership proliferation. *Republic Aviation Corp. v. Labor Board* and *Labor Board v. Le Tourneau Company of Georgia*, 324 U.S. 793."

These principles, respondent respectfully submits, should and do rule the facts of the instant case. The court below correctly found that respondent's employees are not inaccessible to union organizers off of company property and that there was no impediment to union solicitation off that property. (R. 100)

2. The case of Marsh v. Alabama

In the case of *Marsh v. Alabama* 326 U.S. 501 the state punished a distributor of religious literature for trespass when she insisted on passing out pamphlets on a private sidewalk in a company town that had been opened up by the owner to use by the public. This Court there said,

"The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by

the statutory and constitutional rights of those who use it ***". 326 U.S. 501, 506 (Emphasis added)

Based on this proposition the Board here boldly asserts that,

> "Having opened up its property for employee use for its own advantage, respondent cannot exclude as trespassers persons whose presence is necessary for an effective exercise of the employees' statutory rights". (Board's brief in *Babcock and Wilcox*, No. 250, this Term, p. 33)

This statement, which appears to be the crux of the Board's case, is invalid on several counts: first, it assumes a state of facts which is not supported by the record (as the court below correctly found); secondly, the conclusion based on such assumption is not legally justified; and thirdly, it is not a correct statement of the law.

Referring, in part, to the above quotation from the *Marsh* case Mr. Justice Reed had this to say in his opinion in the *Stowe* case;

> "Certain expressions *** occur in the opinion as to the right to use private property for speech, press and assembly but they must be read in the light of the facts in the *Marsh* case. So read, or however read, they cannot be construed as a holding that the natural right of free expression or of assembly, guaranteed by our Constitution, is a delusion unless organizers and evanagelists can commandeer private buildings for use in the propagation of their ideas. The *Marsh* case, in my view, goes no further than to say that the public has the same rights of discussion on the

sidewalks of Company towns that it has on the sidewalks of municipalities". 336 U.S. 286 at 242.

3. The Marshall Field case

In the case of *Marshall Field and Company v. N.L.R.B.*, 200 F. 2d 375, the Court of Appeals for the Seventh Circuit granted enforecement of the Board's order only insofar as it related to the use by non-employee union organizers of Holden Court which, although owned by the employer, partakes of "the nature of a city street" and is used by the public. (p. 380.

Noting the Board's reliance on the *Le Tourneau* case in its decision and in its argument, the court pointed out that that case involved employees. It held that the order of the Board could not be sustained as to property other than Holden Court unless "the employees are 'uniquely handicapped in matter of self-organization and concerted activity' ". (p. 381) The court there found, as in effect did the court below in this case, that substantial evidence was lacking to sustain the contention that non-employee union organizers are unable to contact the employees. Accordingly enforcement of the order was denied excepting only as to Holden Court.

In the case at bar it is clear that respondent has not opened or surrendered control of its property or created a servitude or right of user by grant or otherwise that in any way restricts its right to enforce its no-trespassing rule.

E. The cases in which the charging union was bargaining agent for the employees do not support and are contrary to the Board's order.

Even in cases where the charging union was bargaining agent and it was necessary for its representatives to go upon company property in order to communicate with employees in the discharge of its duties as such bargaining agent, the employers were not required to grant access to such representatives for purposes of solicitation or distribution.

In the case of *N.L.R.B. v. Cities Service Oil Co.*, 122 F. 2d 149 (C. A. 2) the union involved was the bargaining agent for tanker employees who were peculiarly inaccessible to representatives of the union off the vessels on which they worked and lived. While holding that the employer violated the Act by refusing to permit union representatives to come abroad the vessels for the purpose of investigating and negotiating in respect to grievances the court said,

> "*There can*, however, *be no reason for giving the representatives of the Union passes in order that it may solicit new members* or collect dues. Such activities were not shown by the Board to have been required 'for the purposes of collective bargaining or other mutual aid or protection,' even if they are guaranteed under Section 7 under some circumstances. The rights guaranteed by Section 7 primarily concern bargaining as to terms and conditions of employment and not the perpetuation of the tenure of any particular agent.
>
> "Under 2(a) of the order the conditions and the number of passes are to be determined by

> collective bargaining. *but at all events the employer should not be required to issue passes except subject to the condition that they will be forfeited if the holder shall use his access either to solicit union membership or to collect dues.*" (emphasis ours) *N.L.R.B. v. Cities Service Oil Co.*, 122 F. 2d 149, 152.

It was in the circumstances of that case that the court observed "Inconvenience, or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining." 122 F. 2d 149 at 152. The Board has seized upon this statement and has sought to give it a broad application completely inconsistent with and divorced from the context in which it was uttered.

A similar situation was involved in *Richfield Oil Corporation v. N.L.R.B.*, 143 F. 2d 860 (C. A. 9). The court there held that the employer was required to permit representatives of the union that was bargaining agent for the employees to come aboard its vessels:

> "*** for the purposes of collective bargaining, for the discussion and presentation of grievances, and for other mutual aid and protection of the *employees represented by the unions*, including the collection of dues and distribution of trade papers to union members, *provided, however*, that *the petitioner is not required to issue passes for* the solicitation of membership ***." (emphasis ours) *Richfield Oil Co. v. N.L.R.B.*, 143 F. 2d 860, 863.

In the case at bar the charging union was not the

representative of respondent's employees for purposes of collective bargaining. Moreover the inaccessibility of the employees in the *Cities Service* and *Richfield* cases was not here present. Absent, as in this case, status of the union as the bargaining agent and the inaccessibility of employees those decisions support the decision of the court below. That is true even without taking into account those absent factors.

III.

The Decision of the Court Below Is Correct and Should Be Affirmed

The conclusion of the court below (R. 100) that the Board's finding of special circumstances of inaccessibility on which the order rests was not supported by the record considered as a whole was arrived at in the proper discharge of the court's reviewing function under the Act and is supported by the record. The court's conclusions that the respondent's employees were easily accessible to union solicitors and that there was no impediment to union solicitation off company property amounting to a deprivation of the right of self-organization are likewise supported and justified. The record affords no basis for contrary conclusions.

The decision of the Court of Appeals is in accordance with the law as has been pointed out above. It is not at variance with any decision of this court or of any other court of appeals. Being correct on the law and the facts it follows that it should be affirmed.

Conclusion

For the reasons stated, the judgment of the court below should be affirmed.

Respectfully submitted,

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APPENDIX A

The pertinent provisions of the *National Labor Relations Act*, as amended (61 Stat. 136, 29 U. S. C. 151, et seq.), and the text of the *Fifth Amendment to the United States Constitution* are as follows:

NATIONAL LABOR RELATIONS ACT

Section 7

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3)."

Section 8 (a) (1) and (2)

"(a) It shall be an unfair labor practice for an employer:

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

(2) to dominate or interefere with the formation or administration of any labor organization or contribute financial or other support to it: PROVIDED, That subject to rules and regulations made and published by the Board pursuant to Section 6, an employer shall not be prohibited from permitting employees to confer with him

during working hours without loss of time or pay;"

Section 10(e)

"(e) The Board shall have power to petition any United States Court of Appeals (including the United States Court of Appeals for the District of Columbia), or if all the United States Courts of Appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to

questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgement and decree shall be final, except that the same shall be subject to review by the appropriate United States Court of Appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon Writ of Certiorari or certification as provided in Section 1254 of Title 28."

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in

the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."